2011

Jim Purkey and Jan Purkey v. Kent Max Roberts and Jilene Roberts : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

JIM PURKEY AND JAN PURKEY, Plaintiffs, v. KENT MAX ROBERTS AND JILENE ROBERTS*, Defendants/Cross-Claimants/ Appellant, v. DR. ROGER RUSSELL,* Cross-Defendant/Appellee. * – *Parties on Appeal*	Case No.: 20110365-CA Dist. Ct. Case No.: 070600015

BRIEF OF APPELLANT

Appeal from a Final Judgment and an Order Denying Motion
to Alter or Amend the Judgment of the
Sixth Judicial District Court in and for Sanpete County,
The Honorable Marvin D. Bagley Presiding

Jerry D. Reynolds
230 N. 350 E.
Orem, UT 84057
Attorney for Appellee

Michael E. Day (7843)
Nathan Whittaker (11978)
DAY SHELL & LILJENQUIST, L.C.
45 E. Vine St.
Murray, UT 84107
Attorneys for Appellant

ORAL ARGUMENT REQUESTED

All parties to the proceeding in the district court Are listed on the caption of this brief.

TABLE OF CONTENTS

Addendum

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

The Supreme Court has original jurisdiction of this appeal pursuant to Utah Code Ann. § 78A-3-102(3)(j). Pursuant to Rule 42(a) of the Utah Rules of Appellate Procedure, the Supreme Court transferred this appeal to the Utah Court of Appeals, which has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j).

ISSUES AND STANDARDS OF REVIEW

Issue One. Whether the trial court erred when it concluded that the Roberts waived their claim for quiet title of the north boundary of their property west of the Roberts' home, notwithstanding the fact that (1) Mr. Roberts' statement relied upon by the trial court does not unequivocally waive his right; (2) Mrs. Roberts was a joint tenant and co-party to the lawsuit with Mr. Roberts, she did not make any statement of waiver, and Mr. Roberts had no authority to do so on her behalf; (3) there was no motion to dismiss the pending claim made by counsel; and (4) there was no motion to amend Dr. Russell's answer to assert the defense of waiver. (Issue preserved: R. at 691.)

Standard of Review. "Waiver presents mixed questions of law and fact: whether the trial court employed the proper standard of waiver presents a legal question which is reviewed for correctness, but the actions or events allegedly supporting waiver are factual in nature and should be reviewed as factual determinations." *See Chen v. Stewart*, 2004 UT 82, ¶ 23, 100 P.3d 1177. Because the supposed waiver took place on the record and the factual context has been fully preserved on the record, the question of whether a certain statement constitutes waiver is a pure question of law. *Cf. Culbertson v. Board of*

County Comm'rs, 2001 UT 108, ¶¶ 17-20, 44 P.3d 642 (reviewing a trial court's interpretation of a previous court's record *de novo*).

Issue Two. Whether the trial court erred when it concluded that Mrs. Roberts is not entitled to an order enjoining Dr. Russell from further trespassing on her land, notwithstanding the fact that Dr. Russell built a fence on property belonging to the Roberts and that fence remains there to this day. (Issue preserved: R. at 691.)

Standard of Review. Whether certain acts constitute trespass is a question of law, which is reviewed for correctness. *See Walker Drug Co., Inc. v. La Sal Oil Co.*, 972 P.2d 1238, 1243 (Utah 1998).

Issue Three. Whether the trial court erred when it declined to award their attorney fees to the Roberts for prosecuting their claims against Dr. Russell in this matter, notwithstanding the fact that (1) Dr. Russell did not plead or prove an affirmative defense, (2) the Roberts proved all facts necessary to prevail upon their claims at trial, and (3) there was no finding that the Roberts waived their claim for attorney fees. (Issue preserved: R. at 692.)

Standard of Review. A trial court's interpretation of language authorizing attorney fees is reviewed for correctness. *R.T. Nielson Co. v. Cook*, 2002 UT 11, ¶ 16, 40 P.3d 1119. A trial court's determination of the prevailing party is reviewed for abuse of discretion. *Id.* at ¶ 25.

RELEVANT STATUTORY PROVISIONS

There are no statutory provisions whose interpretation is central to this appeal.

STATEMENT OF THE CASE

This case began when Plaintiffs Jim and Jan Purkey sued Defendants Kent Max Roberts and Jilene Roberts on January 23, 2007. (R. at 1.) The Roberts later filed a counterclaim against the Purkeys on September 14, 2007 (R. at 58), and filed a cross-claim against Dr. Roger Russell on September 24, 2008. (R. at 101.)[1] A trial was held on the Purkeys' complaint and the Roberts' counterclaim and cross-claim on March 22-23, 2010 before Judge Marvin D. Bagley. (R. at 659.) At the end of the trial, the District Court made findings of fact and conclusions of law on the record, which were later memorialized in the district court's written Findings of Fact and Conclusions of Law (R. at 676) and Judgment (R. at 686), both entered on September 15, 2010.

Mrs. Roberts filed a Motion to Amend or Alter the Judgment on September 27, 2010 (R. at 690), which the district court denied in an oral ruling dated January 24, 2011. The part of the ruling that is relevant to this appeal was memorialized in writing as Minute Entry and Order Following Hearing Re Defendants' Motion to Alter or Amend Judgment as to Cross-Defendant Dr. Roger Russell, entered on March 31, 2011. (R. at 879.) Mrs. Roberts filed a Notice of Appeal on April 14, 2011. (R. at 885.)

STATEMENT OF THE FACTS

I. BACKGROUND OF THE LITIGATION

Appellant Jilene Roberts is the owner of property located in rural Sanpete County. (R. at 677.) She owned this property as a joint tenant with, and was a co-party in this litigation with her husband, Kent Max Roberts, until he passed away on April 5, 2010.

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1. While the complaint against Dr. Russell was actually a third-party complaint, it was titled as a cross-claim, and so Appellant will follow this convention.

(R. at 677; 731-32.) Appellee Roger Russell is the owner of property that abuts the north boundary of her property. (R. at 677.) Sometime after 1999, a barbed-wire fence was constructed on a line near the border between the properties. (R. at 677.) As a result of a survey commissioned by Mrs. Roberts and her late husband in 2007, the Roberts learned that the fence encroached upon their property by up to 14.5 feet. (R. at 678-79.)

This matter is a part of a larger action that had been filed in 2007 against the Roberts by their neighbors to the East, the Purkeys, regarding a disputed easement on the Roberts property, among other items. (R. at 1; 58.) As part of determining the location of the platted easement with respect to the road actually on the property, the Roberts commissioned the aforementioned survey and learned that the fence encroached upon the Roberts' boundary. (R. at 89.) Dr. Russell refused to move his fence to the surveyed boundary line, so the Roberts decided to bring suit against Dr. Russell. (R. at 89.) Because part of the Roberts' allegations was that the Purkeys' easement was on the north 32 feet of the Roberts' property, the Roberts concluded that it would be proper to adjudicate the north boundary as part of the existing litigation rather than as a separate action. (R. at 89.)

II. PROCEDURAL HISTORY

The Roberts filed a cause of action against Dr. Russell for quiet title and trespass on September 24, 2008 as a cross-claim within the pre-existing litigation between the Purkeys and the Roberts. (R. at 101.) The cross-claim was answered *pro se* by Dr. Russell on October 10, 2008. (R. at 107.) Dr. Russell did not raise any affirmative defenses at that time. (R. at 107.) The Roberts filed for summary judgment on the claim on March 30, 2009. (R. at 127.) The Roberts' motion for summary judgment was granted

in an order dated April 29, 2009, for Dr. Russell's failure to respond. (R. at 255.) On July 23, 2009, Dr. Russell obtained counsel and filed a Motion to Set Aside the summary judgment order (R. at 292), which was granted in an Order entered on October 14, 2009. (R. at 394.) As a condition of setting aside the judgment, the district court ordered that "if Cross-Defendant does not prevail in his defense, Cross-Claimants shall be entitled to their reasonable attorney's fees from . . . May 27, 2009." (R. at 395.)

A. Trial

The matter went to trial on March 22-23, 2010. (R. at 659.) While Dr. Russell now had counsel, he did not amend his answer to assert an affirmative defense before trial. At the beginning of the trial, the court accepted the following facts as admitted (Tr.1 26:17-22):[2]

- That the fence currently near the border between Dr. Russell's property and the Roberts' property was constructed between January 1999 and January 2002. (R. at 590.)
- That either Dr. Russell or his predecessors in interest[3] caused the fence to be built, and did not rely upon any representation by either the Roberts or by Ludlow Engineering in deciding where to build the fence. (R. at 591.)
- That neither Dr. Russell nor his predecessors in interest signed or in any way participated in the creation of Purkey Subdivision Plat A. (R. at 591.)

The undisputed evidence at trial was that the fence currently in place encroached upon the Roberts' property by 14.5 feet on the west side of the property and by 7.4 feet on the

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2. For ease of reference, the trial transcripts of March 22nd (R. at 898) and 23rd (R. at 899) will be referred to as Tr.1 and Tr.2, respectively.

3. While at the time the fence was built, title to Dr. Russell's property was in the name of his son, Matthew Russell, there was no dispute that Dr. Russell was in control of the property at that time.

east side of the property. (R. at 678-79; Ex. 5.)[4] Dr. Russell attempted to amend his answer to assert an affirmative defense after closing arguments had finished at trial, which the district court rejected as untimely. (R. at 683; Tr.2 45:20-46:3.)

At trial, one of the main issues was the proper location of the road that was used by the Purkeys to access their property, which was to the east of the Roberts' property. Before the Purkeys bought the land to the east of the Roberts' property, the Roberts had put in a road, following a two-track trail that had existed before that time. (Ex. 2.) The road was situated near the north boundary of the Roberts property and stretched about 600 feet west of his house to the west edge of his property. (Ex. 4-5.) Power poles were situated to the north of that road. (Tr.1 186:20-187:3; Ex. 20 & 24.) In about 1998, the Purkeys had asked the Roberts for a right of way over the north 32 feet of the Roberts' property. (R. at 677; Ex. 6.) The parties later executed Purkey Subdivision Plat A, which platted the 32-foot right of way west of the Roberts' house to match the road as it existed, rather than platting it on the north 32 feet of the property as had been previously discussed. (Ex. 5 (showing the difference between the "old easement line" and the "32-foot access easement shown on subdivision plat").)

When they first brought their counterclaim against the Purkeys, the Roberts had claimed that the plat map was approved based on a mistake of fact and should be reformed to move the easement over their land to the north 32 feet of their property as they believed they had agreed to. (R. at 62-63.) However, by the time of trial, the Roberts no longer wished to pursue that claim as it related to the west of their house, as they felt

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4. For ease of reference, the trial exhibits (which are in a separate envelope with the record but have not been indexed) will be cited as "Ex." and the number of the Exhibit.

that they were responsible for the location of that portion of the road. Therefore, when Mr. Roberts was asked by the Purkeys' attorney whether the power poles to the west of his house would have to be moved to accommodate a new road, he replied they would not need to be moved. (Tr.1 88:4-89:7.) This was clarified by the Roberts' counsel:

> Mr. Day: What about the next pole down? That would be just to the north of your driveway; is that right?
>
> ***
>
> Mr. Roberts: Yes, sir.
>
> Mr. Day: Would that one need to be moved?
>
> Mr. Roberts: It would have to because it's right in the middle of the easement.
>
> Mr. Day: What about the ones to the west of that? There's some more poles that kind of go down. The road kind of goes around them. Would you insist on having those ones?
>
> Mr. Roberts: No.
>
> ***
>
> Mr. Day: Even though the road could be moved over a little more you wouldn't have to move those poles down there?
>
> Mr. Roberts: No.

(Tr.1 186:10-187:3.) The district court followed up on this line of questioning, asking the following of Mr. Roberts:

> The Court: From your house going west, do you claim that Mr. Purkey is responsible for that road being off where it should be?
>
> Mr. Roberts: No sir.
>
> The Court: So your only concern in this lawsuit is from your house going east?
>
> Mr. Roberts: Going east. I put that road in, sir.

(Tr.1 205:7-13.) The Roberts then went on to move to allow Darryl Penrod, the surveyor for Ludlow Engineering who conducted the survey shown on Exhibit 5, to testify as an

expert witness. (Docket Entry 3-22-10 4:48 PM.) Mr. Penrod testified as to the accuracy of the survey marked as Exhibit 5, and that Dr. Russell's fence did in fact encroach on the north boundary of the Roberts' property by 7.4-14.4 feet. (Docket Entry 3-22-10 4:48 PM-5:22 PM; R. at 678-79.) Also, Dr. Russell's counsel continued to cross-examine witnesses and put on the testimony of Dr. Russell. (Docket Entry 3-22-10 & 3-23-10.) No implications were drawn or arguments made by Dr. Russell's counsel based on Mr. Roberts' statement before the close of testimony.

When Counsel for the Roberts argued in his closing for the relief against Dr. Russell that was requested in the cross-complaint, the district court suggested for the first time that Mr. Roberts' statement with respect to not moving the road to the west of his house somehow waived his claim against Dr. Russell:

> The Court: What is it that your client is asking against Mr. Russell?
>
> Mr. Day: Against Mr. Russell we would like a quiet title to the north boundary according to the property description.
>
> The Court: How come when I asked your client what he was asking in this lawsuit, I asked him specifically because I wanted to know this—
>
> Mr. Day: OK.
>
> The Court: —I said do you want to change anything from your house looking west? He said no, I don't want to change anything from my house looking west. I'm only concerned from my house east.
>
> Mr. Day: And I remember when you asked him that, your Honor, and what I interpreted his answer to be—I think we were talking about the easement. I don't think—
>
> The Court: That's right. I interpreted he was waiving his claim for anything from his house. I don't think it's fair to Mr. Russell for him to say that and then come back and not give him a chance to oppose it. I think your client waives his claim.

Mr. Day: Well, I think that—I would disagree, your Honor. I think that Mr. Roberts has had trouble hearing. He's not a sophisticated person, and I think that he did not intend his answer to say that he was relinquishing his pleaded cause of action to have that boundary on the first. And if there was a misinterpretation there, that is extremely unfortunate, but I think to totally waive and relinquish his claim, I don't have any law on this, your Honor, but I would think that would need to be clear and unequivocal and that would probably need to actually come through his attorney that was what he was intending on doing. I can tell you as his attorney that is not his intention. He never has—throughout the trial we have—

The Court: Well, you—

Mr. Day: We've objected.

The Court: Well, I heard it from him and he's the party so that's what I heard, but go ahead and make your argument.

(Tr.2 23:6-24:19.) The district court then found that when Mr. Roberts had testified, he had waived the Roberts' claims against Dr. Russell to establishing quiet title to the north boundary from the Roberts' house west. (R. at 679, 683; Tr.2 50:16-18.)

The district court also denied the Roberts' claims for trespass, saying that the Roberts had shown no evidence that Dr. Russell had intentionally trespassed. (Tr.2 50:13-15.) Finally, the district court denied the Roberts' claim for attorney fees against Dr. Russell, saying that he had at least partially prevailed on the action. (R. at 683; Tr.2 51:19-52:1.)

B. Motion to Alter or Amend Judgment

After final judgment had been entered, Mrs. Roberts brought a Motion to Alter or Amend. (R. at 690.) Mrs. Roberts argued that the district court's determination of waiver was in error because (a) the statement of Mr. Roberts relied upon by the trial court as a waiver was not an unequivocal relinquishment of the Roberts' right to their property; (b)

Mrs. Roberts did not waive her rights and Mr. Roberts had no authority to do so on her behalf; (c) waiver of a claim after it has been brought to the court must be done through motion and order through counsel; (d) the trial court's ruling on waiver amounted to an amended pleading, and the court did not find express or implied consent to trying the issue, did not consider the prejudice to the Roberts, and did not allow them an opportunity to meet the evidence; and (e) the principles of equity did not favor a waiver given the facts of the case. (R. at 703-08.) Second, Mrs. Roberts argued that the conclusion that there had been no trespass was in error, as a trespasser's belief that he owned the land in question is not relevant to whether there was a trespass to land. (R. at 708-09.) Finally, Mrs. Roberts argued that the denial of attorney fees was in error, as the trial court raised the waiver issue *sua sponte*, Dr. Russell did not plead or prove any affirmative defense, nor did he disprove any of the allegations against him that would have entitled the Roberts to the relief that they were requesting. (R. at 709-10.)

The motion was denied in an order entered on March 31, 2011. (R. at 879.) The trial court denied Mrs. Roberts' motion with respect to waiver, stating the following in its decision:

- "The Court continues to conclude that Mr. Roberts did not care about the fact that the fence was apparently located too far south between the parties' true property line for the portion of the fence line located west of Mr. and Mrs. Roberts' house, and that he essentially said so in his trial testimony." (R. at 880.)
- Because the contested land is featureless and there is a roadway existing between the fence and the rest of Mrs. Roberts' property, moving the fence seems pointless. (R. at 881.)
- Mrs. Roberts had a duty to affirmatively contradict her husband's testimony at trial in order to avoid waiver of her right to have the property adjudicated. (R. at 881.)

- The waiver was relied upon by Dr. Russell and the Court at trial. (R. at 882.)
- The pleadings were amended by the trial evidence. (R. at 882.)

The issue of whether a waiver of a pending claim can be effected by a party without motion and order and without the involvement of counsel was not addressed by the trial court in its ruling.

The trial court also denied Mrs. Roberts' motion with respect to trespass, stating the following:

- "The Court is convinced that such claim by Mr. and Mrs. Roberts requires a factual showing that the trespass of Dr. Russell must be shown to be wrongful." (R. at 883.)
- "In fact, the claim involves that portion of the Roberts' property that is already subject to a general easement by the public, and Dr. Russell likely had the right to be on that property as well as anyone else." (R. at 883.)
- "If Mr. Roberts objected to Dr. Russell's contractor placing the fence west of his house at the location where it was placed, Mr. Roberts should have objected then." (R. at 883.)

Finally, the trial court denied Mrs. Roberts' motion with respect to trespass, stating that "Dr. Russell prevailed in his defense of the Cross Claim by successfully refuting the claims made against him." (R. at 883.) The trial court further entered a finding that "even if the Court were to award fees against Dr. Russell, that such fees would be small because the bulk of the litigation was all directed against the claim of the Purkeys, and presenting Roberts' evidence against the Purkeys." (R. at 884.)

SUMMARY OF ARGUMENT

This Court should overturn the district court's rulings in this matter because (I) Mr. Roberts' statement at trial was not legally sufficient to waive his and Mrs. Roberts' cause of action and rights to their real property; (II) the district court's ruling that trespass

requires wrongful intent is not supported by law; and (III) Dr. Russell did not prevail in his defense when the elements of the case against him were proven and he pleaded no affirmative defense.

ARGUMENT

The most troubling part of the district court's ruling and decision in this case is the degree to which it is unfettered to any existing case law. In ruling upon Mrs. Roberts' motion to alter or amend the judgment, the district court did not issue a written decision. Rather, it announced it in a telephone conference five days after the hearing on the motion. (Docket Entry 2-24-11.) The court did not cite relevant authority in that conference, and none was included in the order prepared by Dr. Russell's counsel. (R. at 879-84.) Nor did the district court address the authority provided by Mrs. Roberts.

This was improper. As the United States Court of Appeals for the Third Circuit has stated:

> Judicial opinions are the core work-product of judges. They are much more than findings of fact and conclusions of law; they constitute the logical and analytical explanations of why a judge arrived at a specific decision. They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic. When a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions.

Bright v. Westmoreland County, 380 F.3d 729, 732 (3d Cir. 2004); *see also In re Colony Square Co.*, 819 F.2d 272, 275 (11th Cir. 1987) ("The quality of judicial decisionmaking suffers when a judge delegates the drafting of orders to a party; the writing process requires a judge to wrestle with the difficult issues before him and thereby leads to stronger, sounder judicial rulings."); *Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719, 724 (4th Cir. 1961) (holding that delegating the task of writing an opinion to an attorney

"involves the failure of the trial judge to perform his judicial function."). Because the district court's ruling is clearly unsupported by Utah law, this Court should reverse the district court's decision and direct the trial court to enter judgment for Mrs. Roberts on the issues of quiet title and trespass and to determine the appropriate amount of attorney fees to be awarded to Mrs. Roberts from May 27, 2009 to the present. Mrs. Roberts also asks for her attorney fees incurred on appeal pursuant to the district court's order of October 14, 2009.

I. THE DISTRICT COURT ERRED IN RULING THAT THE ROBERTS HAD WAIVED THEIR CLAIM FOR QUIET TITLE TO THE NORTH BOUNDARY WEST OF THEIR HOUSE.

At the outset, Mrs. Roberts notes the odd circumstances of the district court's conclusion of waiver. The trial court's conclusion was that Mr. Roberts had just withdrawn part of his cause of action without a motion voluntarily dismissing that claim made by him or his counsel, had given away part of land belonging to him and his wife without the need of his wife's consent, and was not allowed to withdraw the waiver even though no party had taken any act in reliance upon it, all by making a statement that did not relate to the Roberts' claim against Dr. Russell. Moreover, this is was a legal theory that did not make an appearance until the district court proposed it *sua sponte* after the close of evidence, without any amendment of Dr. Russell's answer to assert this defense and without giving the Roberts the opportunity to address the legal theory. Any one of these arguments is sufficient reason why the district court's finding of waiver was improper and should be reversed.

A. Mr. Roberts did not clearly and unequivocally waive the Roberts' claim for quiet title of the north boundary.

The first reason that the district court's ruling was in error is because Mr. Roberts' statement is not consistent with an unequivocal relinquishment of a right. Waiver is the "intentional relinquishment of a known right." *Rees v. Intermountain Health Care Inc.*, 808 P.2d 1069, 1074 (Utah 1991). To constitute waiver, there must be "an existing right, benefit, or advantage, knowledge of its existence, and an intention to relinquish it. It must be distinctly made, although it may be express or implied." *Id.* at 1074-75. A waiver must be "unequivocal or at least inconsistent with any other intent" when looking at the totality of the circumstances surrounding the alleged waiver. *Id.* at 1075. Substantial legal rights, such as "the right to apply to the courts for relief for the perpetration of a wrong," cannot be waived, "except 'in the most unequivocal terms.'" *Jenkins v. Percival*, 962 P.2d 796, 799 (Utah 1998).

The statement of Mr. Roberts that the Court relies upon in finding waiver is not unequivocal and so cannot be a waiver. The context of the Court's question was the road west of Mr. Roberts' house, not the fence, and the subject of the question was the Roberts' relief against the Purkeys, not their relief against Russell. There is simply no way to interpret Mr. Roberts' statement as an unequivocal statement of waiver of a subject that the Court did not bring up. Further, the totality of the circumstances does not support a finding of waiver. As the previous paragraph makes clear, a party cannot accidentally waive a right; the party's relinquishment had to be knowing and intentional. Despite the district court's argument in its ruling denying the motion to amend or alter

the judgment that "Mr. Roberts did not care about the fact that the fence was apparently located too far south between the parties' true property line for the portion of the fence line located west of Mr. and Mrs. Roberts' house," If the Roberts had intended to waive their claim, they would not have presented evidence as to the proper boundary to the west of their house, and would not have argued so strenuously with the Court during closing arguments. In short, the record facts do not support a finding of waiver.[5]

B. The waiver was ineffective, as Mr. Roberts had no authority to waive Mrs. Roberts' claim for quiet title of the north boundary.

The district court also erred in finding waiver, as Mrs. Roberts did not indicate that she had waived her rights, and she was both co-owner of the property at issue and one of the cross-claimants. It is a settled principle of law that one person cannot waive the rights of another unless the waiving party is authorized to act as the agent for the other person. *See* 28 Am. Jur. 2d *Estoppel* § 199 (2010). Further, the acts of one joint tenant cannot bind the property without assent from other joint tenants. *See Centennial Inv. Co. v. Nuttall*, 2007 UT App 321, ¶¶ 10-11, 171 P.3d 458. Utah law holds that a spousal relationship is not sufficient, without more, to find that one spouse is acting as the agent for the other. *See Ellsworth v. American Arbitration Ass'n*, 2006 UT 77, ¶ 21, 148 P.3d 983; *Macris v. Sculptured Software, Inc.*, 2001 UT 43, ¶ 22, 24 P.3d 984. This is true

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5. The trial court's statement that "Because the contested land is featureless and there is a roadway existing between the fence and the rest of Mrs. Roberts' property, moving the fence seems pointless" is not a legal reason to deny relief. Mrs. Roberts is entitled to regain possession and quiet her title to the land regardless of whether the district court believes that the land was too small to fight over. Moreover, it is curious that if the ground was so useless, why Dr. Russell has fought about it as long as he has rather than giving Mrs. Roberts the relief to which she was clearly entitled.

even if one spouse took the lead in managing or controlling the joint property. *See Macris*, 2001 UT 43, ¶ 22.

At trial, there was no evidence that Mr. Roberts had authority to act or was acting as his wife's agent in waiving any claims, and the Court did not make a finding to that effect in the Findings of Fact in this matter. Also, Mrs. Roberts gave evidence after trial that Mr. Roberts did not have authority or permission to unilaterally waive any claims of the parties. (R. at 725-727.) The district court did not find that Mr. Roberts was Mrs. Roberts' agent, and there were not sufficient facts in the record to find that he was acting as such.

The trial court's statement that Mrs. Roberts had a duty to affirmatively contradict her husband's testimony at trial in order to avoid waiver of her right to have the property adjudicated is without any support in Utah law. The Utah Supreme Court has explained that "mere silence is not a waiver unless there is some duty or obligation to speak." *Soter's, Inc. v. Deseret Federal Sav. & Loan Ass'n*, 857 P.2d 935, 940 (Utah 1993). Mrs. Roberts was not asked about her husband's statement or whether she waived the claims. The did not cite any authority (and Mrs. Roberts is aware of none) that would require Mrs. Roberts to affirmatively repudiate her husband's alleged waiver under these circumstances. Also, given the statement in her declaration that she did not believe that Mr. Roberts had intended to waive the claim (R. at 726), it is reasonable that she did not repudiate a waiver that she was not aware of. Because Mrs. Roberts did not waive her right to pursue quiet title, this Court should reverse.

C. *Waiver of a claim after a proceeding has begun can only occur through motion and order. As Mr. Roberts was represented by counsel, he could not make a motion to the district court* pro se.

Because the claim for quiet title of the boundary west of the house was a cause of action before the Court, Mr. Roberts did not have the authority to withdraw the claim or amend it in any way except through motion brought by his attorney of record. A motion to voluntarily withdraw a claim is governed by Rule 41 of the Utah Rules of Civil Procedure. The motion may only be granted upon stipulation, or upon such terms and condition as the Court deems proper. When a party is represented by counsel, these motions may only be brought through counsel. *See Watson v. Gibson Captial, L.L.C.*, 187 P.3d 735, 738 (Okla. 2008). A party may not act as his own attorney and be represented by counsel at the same time. *See id.*; *United States v. Durden*, 673 F. Supp. 308, 309-10 (N.D. Ind. 1987); *see also* Utah R. Prof'l Conduct 1-2 (outlining the allocation of authority between a lawyer and client).

In this case, the Roberts were represented by counsel, and counsel never made any motion to withdraw the claim at trial. Without an attorney's action, any waiver of a claim pending before the district court would be ineffective. The Court should therefore reverse the district court's decision.

D. *The district court abused its discretion in finding waiver, as the finding amounted to granting an amended pleading under Rule 15(b) without finding express or implied consent to trying the issues, and without considering the prejudice to the Roberts or allowing them an opportunity to meet the evidence.*

Because Dr. Russell did not assert an affirmative defense of waiver as required by Utah R. Civ. P. 8(c), the Court's finding of waiver was tantamount to a *sua sponte*

amendment of Russell's answer after the close of evidence. In such a circumstance, a trial court must first determine whether the issue was tried with the express or implied consent of the parties. *See Fibro Trust, Inc. v. Brahman Financial, Inc.*, 974 P.2d 288, 291 (Utah 1999). Where there is no such finding,

> the trial court's discretion to grant amendment of the pleadings is conditioned on the satisfaction of two preliminary requirements: a finding that the presentation of the merits of the action will be subserved by amendment and a finding that the admission of such evidence would not prejudice the adverse party . . . . The trial court has only limited discretion in making these preliminary findings . . . .

Id. Allowing amendment of a pleading under Rule 15(b) without following this analysis is abuse of discretion. *See id.* at 292.

The district court stated in its ruling denying the motion to alter or amend the judgment that "the prior pleadings of the parties was amended by trial evidence as provided by URCP Rule 15." This statement is not a finding of fact, but rather a conclusion of law. *See Fibro Trust*, 974 P.2d at 291. Therefore, as it is not supported by any actual findings of fact that would support the conclusion, the Court cannot give it any deference. Rather, the facts are as follows: no party ever mentioned the theory that Mr. Roberts' statement constituted a waiver during the presentation of evidence or at any time before the district court suggested it during closing arguments. The Roberts objected to Dr. Russell's attempt to argue an affirmative defense in his closing argument (Tr.2 44:25-45:8), and the district court denied Dr. Russell to amend his pleadings after the close of evidence. (Tr.2 45:20-46:3.) The Court did not opine on the issue of implied or express

consent in its oral ruling or findings of fact. In sum, there are no grounds for finding that the waiver issue was tried by consent.

Because of this, the district court could only allow amendment if it would advance the merits and not prejudice any party. The district court did not make those findings, and could not, as the district court did not allow the Roberts to present evidence or arguments about prejudice before finding waiver. The introduction of a defense after the close of evidence is prejudicial to the Roberts, as they never had any opportunity to present any evidence to refute the defense. This is clearly counter to Utah R. Civ. P. 15(b), which provides: "The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence." Because the district court did not take any evidence or make any findings about the prejudice that the Roberts would suffer before effectively amending the pleadings, the district court's action is an abuse of discretion. *See Fibro Trust*, 974 P.2d at 292. This Court should therefore reverse.

E. The district court abused its discretion in finding waiver, as the principles of equity do not favor a waiver given the facts of the case.

Finally, the district court's decision was in error because it is inconsistent with the principles of equity, as there was never any reliance or acceptance of the waiver by Dr. Russell . Waiver is an equitable doctrine. That means that where there is no showing of prejudice, there can be no assertion of waiver. *Chandler v. Blue Cross Blue Shield of Utah*, 833 P.2d 356, 358 (Utah 1992); *Hecla Mining Co. v. Star-Morning Mining Co.*, 839 P.2d 1192, 1196 (Idaho 1992). Also, because a waiver must be accepted and received

by the party benefiting from the waiver, *Gerard v. Sanner*, 103 P.2d 314, 318 (Mont. 1940), it is not an issue that is properly raised by the Court *sua sponte*.

In this case, Dr. Russell never asserted waiver as an affirmative defense. He also did not show any reliance upon the statements of Mr. Roberts at trial, and did not indicate that he would suffer any prejudice if the waiver were withdrawn. The district court stated in its ruling denying the motion to amend or alter the judgment that "Dr. Russell and his attorney relied on this waiver," but in context, it appears that the district court's meaning was that it relied upon the statement at trial. While the district court's statement is unclear and appears not to be a complete sentence, it seems to argue that the *district court* relied upon Mr. Roberts' testimony for not considering other affirmative defenses that were brought up by Dr. Reynolds in his closing arguments. First, it is not the district court's reliance that counts when considering an equitable defense, it is a defendant's reliance. Obviously Dr. Russell cannot be said to have relied upon Mr. Roberts' statement in not pleading an affirmative defense, as Dr. Russell (a) did not at any time before trial (and before the statement was made) attempt to assert an affirmative defense, although he had ample opportunity to do so, and (b) *did* attempt to assert an affirmative defense in his closing arguments, after the statement was made. Also, the trial court does not identify what evidence Dr. Russell decided not to put on because of Mr. Roberts' statement. The district court should be required to come up with more than a conclusory statement of reliance for this Court to give this statement any weight. *See Acton v. Deliran*, 737 P.2d 996, 999 (Utah 1987) ("The findings [of fact] should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each

factual issue was reached."). Because there is no showing of reliance, the principles of equity and justice do not support applying waiver to the statements in this case.

II. THE DISTRICT COURT ERRED WHEN IT DENIED THE ROBERTS' CLAIM FOR TRESPASS.

The trial court's holding that Dr. Russell did not commit trespass when he built a fence on the Roberts' land is an error. A defendant is liable to a plaintiff for trespass when (1) the plaintiff had ownership and actual or constructive possession of the property; (2) the defendant interfered with the plaintiff's exclusive right to possession of the property by entering the plaintiff's land; (3) the defendant intended to perform the act that amounted to the unlawful invasion of the plaintiff's property; and (4) the defendant had no right to do the act that constituted the unlawful invasion of the plaintiff's property. *See* MUJI (Civil) § 4.9; Restatement (Second) of Torts § 158 (1965). In this case, the undisputed evidence was that Russell intentionally caused a fence to be built upon the Roberts' land. This act constitutes a continuing trespass from the time that Dr. Russell caused the fence to be built until the present. *See* Restatement (Second) of Torts § 161. Mrs. Roberts is therefore entitled to an order enjoining Dr. Russell from any further trespass, the effect of which would be to require him to move the fence off of Mrs. Roberts' property, *see id.*, and nominal damages, as she did not put on evidence of actual damages at trial, *see Henderson v. For-Shor Co.*, 757 P.2d 465, 471-72 (Utah App. 1988).

Notwithstanding the clear evidence and law on this issue, the trial court denied the Roberts' claim for trespass. In its ruling denying the Roberts' motion to alter or amend

the judgment, it gave three reasons for its decision: (1) trespass requires evidence of wrongful entry, (2) there was a general easement over the land in question, and (3) the Roberts made no objection until the survey was done. These arguments will be dealt with in turn. First, the trial court asserted that a trespass claim "requires a factual showing that the trespass of Dr. Russell must be shown to be wrongful." (R. at 882.)[6] This statement is without any support in Utah law. The requisite intent is the intent to enter the land of another, and it is irrelevant whether the trespasser believed that he was entitled to the land. *See Gallegos v. Lloyd*, 2008 UT App 40, ¶ 11, 178 P.3d 922.

The trial court's next justification for its decision is that "the portion of the Roberts' property" that Dr. Russell built the fence on "is already subject to a general easement by the public, and Dr. Russell likely had the right to be on the property as well as anyone else." (R. at 882.) This statement is incorrect both on the facts and the law. The easement that the district court refers to is established by Purkey Subdivision Plat A, which was dedicated on October 4, 2002. (*See* R. at 678; Ex. 4.) As shown by the plat and the 2007 survey, the easement does not follow the property line, but rather is entirely south of Dr. Russell's fence. (*See* Ex. 4-5.) Further, the easement is not a "general easement by the public." Rather, Purkey Subdivision Plat A shows areas marked as "32-foot access easements" and states that the parties to the plat "dedicate the streets hereon

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6. While the word "wrongful" in this statement is somewhat ambiguous, it is clear from the context that the district court meant that the Roberts had to show that Dr. Russell intended to enter the land in contravention of the rights that he believed he had at the time, as the evidence that Dr. Russell intended to have the fence built where he did was uncontested.

for the perpetual use of the land owners and public safety access." (*See* Ex. 4.) The district court correctly concluded that this language "created a quasi-public road" that gave the landowners of the subdivision full rights to use the easement "consistent with the use of a street," but limited the public use of the easement to "public safety access." (R. at 680.)[7] Dr. Russell is not listed as a property owner in the subdivision (*see* Ex. 4; R. at 591 (Admission no. 6); Tr.1 26:17-22 (accepting Requests for Admission no. 1-2 and 6-9 as admitted)), and putting up a fence is not consistent with the use of a street at any rate. *See Wykoff v. Barton*, 646 P.2d 756, 758 (Utah 1982) (holding that the scope of an easement is "limited to the uses and extent fixed by the instrument"). Finally, by its very nature, building a fence is an act of possession of any land on the builder's side of the fence and excluding others, including the rightful owner, from the property. *Ansay v. Boecking-Berry Equipment Co.*, 450 F.2d 433, 436 (10th Cir. 1971). It is therefore an act not consistent with an easement. *See Wykoff*, 646 P.2d at 759-60 (holding that the owner of servient property retains the right to possess the property and use it in any way that would not unreasonably interfere with the easement).

Finally, the trial court argued that if the Roberts "objected to Dr. Russell's contractor placing the fence west of his house at the location where it was placed," that they "should have objected then." (R. at 882.) Again, there is no support for this conclusion in Utah law. Trespass is a strict-liability tort, which means that it the person

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7. Because this interpretation of the plat map is correct as an issue of law, to the extent that the district court's later ruling conflicts with that interpretation, this Court owes it no deference. *See Hartman v. Potter*, 596 P.2d 653, 656 (Utah 1979) (holding that interpretation of a deed is a question of law).

building a structure bears the burden of ensuring that it does not encroach upon other people's property. *See Burns Philp Food, Inc. v. Cavalea Continental Freight, Inc.*, 135 F.3d 526, 529 (7th Cir. 1998); Restatement (Second) of Torts § 158. In essence, the district court is arguing that the burden of avoiding encroachment should be borne by the property owner, which is contrary to the law of trespass. A property owner's failure to object to an encroachment that the property owner is not aware of does not grant consent or a license. In reviewing facts similar to the present case, the United States Court of Appeals for the Seventh Circuit explained:

> Burns Philp [the counterclaim defendant] did not seek anyone's consent to build the fence. It thought that the fence was on its land, and no one knew otherwise until 1995. Knowledge of a fence's existence is not equivalent to consent—not, at least, when the landowner does not suspect that the border has been crossed.

Burns Philp Food, 135 F.3d at 529. Moreover, any license would be gratuitous, and would have been revoked upon the Roberts' demand that Dr. Russell move the fence. *See* Restatement (Second) of Torts § 160. Finally, any claim of license, consent, waiver, equitable estoppel, laches, or the statute of limitations was not pleaded, which constitutes a waiver of those defenses under Utah R. Civ. P. 8(c). For the foregoing reasons, this Court should reverse the district court's ruling on the issue of trespass and remand with instructions to order Dr. Russell to remove his fence and for nominal damages.

III. THE DISTRICT COURT ERRED WHEN IT RULED THAT DR. RUSSELL HAD PREVAILED IN THE LITIGATION.

Finally, the district court's ruling that Dr. Russell had "at least somewhat successfully defended" the case against him is in error. If this Court overturns the district

court's rulings on quiet title and trespass, the error would be self-evident. However, even if this Court were to affirm the first two issues, the district court's ruling on this issue would still be in error, as the Roberts proved their *prima facie* case, and but for the waiver issue raised *sua sponte* by the district court, Dr. Russell would not have prevailed in any way at trial. Whether Dr. Russell prevailed in his defense should be determined by looking at the language of the order authorizing attorney fees; whether the allegations against him were shown to be sufficient to provide the relief requested,[8] and whether he proved any affirmative defenses that would have precluded relief by the Roberts. *See R.T. Nielson Co.*, 2002 UT 11 at ¶ 25.

In this case, the district court stated in an order that "if Cross-Defendant does not prevail in his defense, Cross-Claimants shall be entitled to their reasonable attorney's fees from . . . May 27, 2009." This order was inserted to ensure that Dr. Russell actually had a meritorious defense to the Roberts' claims. However, Dr. Russell never brought any affirmative defenses, and there was no evidence presented that would have precluded the Roberts' claim to quiet title or trespass. As of the day of the order, Dr. Russell had no defenses. It was only after the district court raised the issue of waiver *sua sponte* based on Mr. Roberts' statements several months after the date of the order that Dr. Russell had any defense at all. This cannot be said to be "prevailing in one's defense," as it avoided

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8. While the Cross-Complaint states that the boundary was off by 32 feet in places, the fact that the relief requested by the Roberts was to have the boundary recognized consistently with the survey strongly suggests that the claim of 32 feet was a typographical error. Regardless, there is no basis for holding the Roberts to a standard higher than proving facts that would entitle them to the complete relief requested in their complaint.

the reason that the order for attorney fees was entered, namely to ensure that Dr. Russell had a meritorious defense at the time when the district court set aside the order.

Furthermore, the district court's statement in its ruling denying the motion to alter or amend the judgment that "even if the Court were to award fees against Dr. Russell, that such fees would be small because the bulk of the litigation was all directed against the claim of the Purkeys, and presenting Roberts' evidence against the Purkeys" is improper and not based on any evidence. The amount of attorney fees awarded should be based on the evidence brought forward by affidavit, and should consider "the difficulty of the litigation, the efficiency of the attorneys in presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case and the result attained, and the expertise and experience of the attorneys involved." *Salmon v. Davis County*, 916 P.2d 890, 893 (Utah 1996). A district court that does not have this evidence should not presume to pre-judge the amount of attorney fees, as that gives the appearance of an improper bias or prejudice. For the foregoing reasons, this Court should reverse the trial court's decision and direct it to consider all of the evidence about the proper amount of attorney fees in this case, including those amounts expended on appeal.

CONCLUSION

For the foregoing reasons, Mrs. Roberts respectfully asks this Court to reverse the district court's decision, to direct the district court to enter judgment for Mrs. Roberts on the issues of quiet title and trespass and to determine the appropriate amount of attorney

fees to be awarded to Mrs. Roberts from May 27, 2009, to the present, and to award Mrs. Roberts her attorney fees incurred on appeal.

RESPECTFULLY SUBMITTED this 7th day of September, 2011.

/S/ Nathan Whittaker
Nathan Whittaker
DAY SHELL & LILJENQUIST, L.C.
Attorney for Defendant/Appellant

PROOF OF SERVICE

I hereby certify that I caused two copies of the foregoing brief to be placed in the United States Mail, first class, postage prepaid, to the following:

Jerry D. Reynolds
230 N. 350 E.
Orem, UT 84057

DATED this 7th day of September, 2011.

/S/ Nathan Whittaker

ADDENDUM

Michael E. Day (7843)
michael@dslaw.com
Nathan Whittaker (11978)
nathan@dslaw.com
DAY SHELL & LILJENQUIST, L.C.
45 East Vine Street
Murray, UT 84107
Telephone: (801) 262-6800
Fax: (801) 262-6758
Attorneys for Defendants and Cross-Claimants

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
SANPETE COUNTY, STATE OF UTAH, MANTI DEPARTMENT

JIM PURKEY AND JAN PURKEY, Plaintiffs, v. KENT MAX ROBERTS AND JILENE ROBERTS, Defendants.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**
KENT MAX ROBERTS AND JILENE ROBERTS, Cross-Claimants, v. DR. ROGER RUSSELL, Cross-Defendant.	Case No.: 070600015 Judge: Marvin D. Bagley

A trial was held in this matter on March 22-23, 2010. After hearing the parties' evidence, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Utah Rules of Civil Procedure:

FINDINGS OF FACT

1. Defendants Ken and Jilene Roberts (hereafter "the Roberts") bought a five-acre parcel of property north of Fairview in 1992. They built a home on this property shortly thereafter. To the east of their property was a large foothill.

2. Plaintiffs Jim and Jan Purkey (hereafter "the Purkeys") bought a ten-acre piece of property directly to the east of the Roberts in 1997. Shortly after buying the property, the Purkeys proceeded to build a house thereon. At that time, the Purkeys improved an existing path that went from the northeast corner of the Roberts' driveway up the hillside toward their house.

3. Directly north of the Roberts' property is a large field owned by the Cross-Defendant, Roger Russell (hereinafter "Russell"). There is a barbed-wire fence that was constructed in approximately 2000 on a line near the border to the properties.

4. In the course of building their house, the Purkeys bulldozed an area of scrub oak trees and brush to the east of the Roberts' house. While the Purkeys believed at the time that it was their property, the property actually belonged to the Roberts.

5. On May 6, 1998, Jilene Roberts signed a quitclaim deed purporting to give a right-of-way over the north 32 feet of their property to Jim and Jan Purkey. Kent Roberts did not sign this deed. This deed was recorded in Book 418, Page 883 of the Sanpete County Records.

6. In about January of 1999, the Purkeys contracted with Daley & Associates to have a survey done. The Court finds based on the uncontested evidence that the methodology of this survey was flawed and the results were inaccurate. The Court therefore gives the Daley survey no weight in determining the boundary.

7. On October 4, 2002, Kent Roberts, Jilene Roberts, Jim Purkey and Jan Purkey, as well as the other property owners in a specified area signed and dedicated a plat map. This plat map indicated that a thirty-two foot wide strip of land dedicated as a street for the perpetual use of the land owners and public safety access. The Plat Map also delineated the boundaries between Defendants' property and Plaintiffs' Property. This plat map and dedication was later accepted by Sanpete County. This Plat Map was recorded as Entry no. 98595 in the Sanpete County Records.

8. In about May of 2005, in response to complaints from the Roberts that the existing road at the time strayed from the location of the right-of-way, the Purkeys agreed to move the road. Jim Purkey represented to Kent Roberts that a survey marker placed earlier by Daley & Associates was the north corner between their properties. Kent Roberts did not investigate or verify this claim, and simply took a measuring tape, measured thirty-two feet due south of the point and drove a pipe into the ground to mark the south boundary of the easement. The Court finds that the placement of the road was due to a mutual mistake of fact and mutual failure to make a reasonable inquiry.

9. The Purkeys moved the road to the area between the survey marker and the pipe. The placement of the new road caused drainage issues, which caused water damage to the Roberts' home. Also, the placement of the road necessitated that a power pole be moved. In the course of moving the power pole, the wires connected to the Roberts' house were jerked, damaging the façade and roof of the Roberts' house. Also, in moving the road, the Purkeys moved the beginning of the slope from the northeast corner of the Roberts' driveway to approximately the middle of the Roberts' driveway.

10. In about June of 2007, Ludlow Engineering performed a survey of the road and the boundary between the Purkeys and the Roberts at the request of the Roberts. The survey found that

the existing road diverted from the right-of-way as shown on the plat map east of the Defendants' house. The survey also found that a fence constructed by the Purkeys encroached upon the east boundary of the Roberts' Property. The accuracy of this survey was not questioned at trial. This survey also indicated that the fence between the Roberts and Russell was not on the boundary line, but encroached upon the Roberts property by up to 14.5 feet.

11. In about September of 2007, Ludlow Engineering surveyed the existing road and drew up an engineering plan for a new road that would that would comply with the maximum grade requirements and set back the beginning of the slope back to the northeast corner of the Roberts' driveway.

12. Plaintiffs and Defendants live in a rural area where occasional burning of garbage is not inconsistent with the character of the area. The Court finds that occasional burning is not an unreasonable use of the property.

13. Defendant has used the eastern portion of his property to store items of personal property. Lee Holmstead, the Sanpete County Zoning Administrator, testified that in his opinion, the stored items did not constitute a junkyard under Sanpete County ordinance.

14. There was testimony that garbage had occasionally blown onto the roadway, but there was no evidence that garbage had been dumped or stored on the roadway.

15. At trial, the Court questioned Kent Roberts regarding his claim as to the area west of his house. (Foundation for waiver).

CONCLUSIONS OF LAW

Plaintiff's Right-of-Way

16. The dedication of the plat map created a quasi-public road on the land that is indicated on the plat map. The public use is limited to public safety access, and the landowners indicated on the plat have full rights to use the area shown on the map consistent with the use of a street.[1]

17. The 1998 right-of-way is valid as a matter of law, but is superceded by the dedication on the plat map. This document would only control if, under operation of law, the dedication of the road under the plat map were extinguished.

18. Because Plaintiffs have a right to use the portion of Defendants' property as a road, Defendants do not have the right to use this property in a way that would interfere with Plaintiffs' use as a road. This would include any digging into the road, obstruction of the road, dumping garbage onto the right of way, or other unreasonable interferences.

19. However, the law does allow for the Roberts' use of the right-of-way in a manner that does not interfere with the Purkey's interests.[2] Allowing guests to park on the side of the road, or pushing snow onto the shoulder, for example, does not interfere with the easement so long as the use does not obstruct the Purkeys' use of the right-of-way.

Boundary Line Between the Roberts and Purkeys

20. The 2002 Plat Map constitutes the most recent instrument that defines the property line between the Roberts and the Purkeys. There was no evidence presented at trial that would contradict the validity of this boundary, and so the Court holds that the legal boundary between the properties is the boundary indicated on the Plat Map.

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1. *See* Utah Code Ann. § 17-27a-607.
2. *See* Restatement (Third) of Property: Servitudes § 4.9.

21. Any fences or other structures placed by the Purkeys that encroach upon the Roberts' property are not properly there. It is just and proper that the Purkeys should bear the expense of moving these items.[3]

22. There was evidence that there are existing markers on the ground that were placed by Ludlow Engineering. The parties should use those markers in determining and verifying the boundary. If these markers no longer exist, it is just and equitable for the parties to share the cost of establishing those markers equally.

Location of the Road and Damages for Negligence

23. The road to the east of the Roberts' driveway should be moved onto the right-of-way as indicated on the 2002 Plat Map. Because the Purkeys enjoy the benefits of the roadway, it is their responsibility to pay for reconstructing the road.[4]

24. The misplacement of the road caused damage to the Roberts' property. However, the Roberts could have avoided these damages by independently verifying the location of the boundaries. Because the parties were equally to blame for the misplacement of the road, comparative fault principles bar recovery for damages by the Roberts.[5]

25. However, the Court is mindful that, in going forward, the parties should work to avoid these problems. To ensure that the new road does not interfere with the Roberts' rights to quietly enjoy their property,[6] the road must be engineered to avoid building up the slope in the Roberts' driveway and to avoid the runoff of surface waters. The Court has latitude to fashion a

3. *See Crimmons v. Simonds*, 636 P.2d 478, 480 (Utah 1981).

4. *See* Restatement (Third) of Property: Servitudes § 4.13.

5. *See* Utah Code Ann. § 78B-5-818(2).

6. *See Sanford v. University of Utah*, 488 P.2d 741, 744 (Utah 1971).

remedy in this matter consistent with the principles of equity.[7] Based on the evidence presented at trial, the feasibility study created by Ludlow Engineering takes into account and would solve the problems with the existing road. The Court therefore holds that the Purkeys should follow the feasibility study in constructing a new road.

26. Based on the Court's question to Jim Purkey about an appropriate timeframe for moving the road, the Court holds a reasonable timeframe for completion of moving the road and all structures placed on the Roberts' property by the Purkeys is September 23, 2010.

Burning and Storing of Items

27. This law restricts a property owner's right to freely use his property in any way he wishes if the use is unreasonable and substantially interferes with his neighbor's quiet enjoyment of his property.[8]

28. Given the rural character of the parties' property, the activities of the Roberts that the Purkeys are complaining about are not unreasonable.[9] Occasional burning of trash, so long as it is compliant with county ordinances, is a reasonable use of the property. Also, there was no evidence that the items stored on the east side of the Roberts property invaded any more than the aesthetic interests of the Purkeys. This is not an actionable interest under the common law of nuisance.[10]

Trespass and Conversion

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7. *See* Restatement (Third) of Property: Servitudes § 4.13.

8. *See Johnson v. Mount Ogden Enterprises*, 460 P.2d 333, 336 (Utah 1969); *Branch v. Western Petroleum*, 657 P.2d 267, 274 (Utah 1982); *Dahl v. Utah Oil Refining Co.*, 262 P. 269, 273 (Utah 1927).

9. *See Dahl*, 262 P. at 273; MUJI (Civil) § 4.16.

10. *See Dahl*, 262 P. at 273; MUJI (Civil) § 4.16; 58 Am. Jur. 2d *Nuisances* § 87 (2009).

29. The Roberts request damages based on the Purkeys use of the roadway to the extent that they were not on the easement, and bulldozing the area east of the Roberts' house, destroying the trees and topsoil.

30. The Court holds that, because the Purkeys believed that they had a right to use the property that they were on, damages for trespass and conversion would not be appropriate.

North Fenceline

31. The Roberts request quiet title of the north boundary of their property and an order requiring Russell to move the existing fence off of the Roberts' property.

32. Russell has not asserted any affirmative defenses in this matter, and the evidence presented at trial is not sufficient for this court to hold that the fence constitutes a boundary by acquiescence.

33. However, this Court holds that Kent Roberts waived his claims for anything west of the house.

34. The Roberts are entitled to an order establishing the boundary line as shown on the Plat Map to the point east of the west line of his house. Any fences built on that portion of the property should be built on the property line.

Costs and Attorney fees

35. No party prevailed in this litigation for purposes of Utah R. Civ. P. 54(d), and so no party is entitled to their costs.

36. There have been no sufficient grounds presented for the awarding of attorney fees in this matter.

DATED this 15th day of Sept., 2010.

BY THE COURT:

/S/ /S/ MARVIN D BAGLEY

Marvin D. Bagley
SIXTH DISTRICT COURT

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing to be placed in the United States Mail, first class, postage prepaid, to the following:

Charles W. Hanna
727 North 1550 East, Ste. 400
Orem, UT 84097

Jerry D. Reynolds
230 N. 350 E.
Orem, UT 84057

DATED this 31st day of August, 2010.

/S/ Nathan Whittaker

Michael E. Day (7843)
michael@dslaw.com
Nathan Whittaker (11978)
nathan@dslaw.com
DAY SHELL & LILJENQUIST, L.C.
45 East Vine Street
Murray, UT 84107
Telephone: (801) 262-6800
Fax: (801) 262-6758
Attorneys for Defendants and Cross-Claimants

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
SANPETE COUNTY, STATE OF UTAH, MANTI DEPARTMENT

JIM PURKEY AND JAN PURKEY, Plaintiffs, v. KENT MAX ROBERTS AND JILENE ROBERTS, Defendants.	**JUDGMENT** Case No.: 070600015 Judge: Marvin D. Bagley
KENT MAX ROBERTS AND JILENE ROBERTS, Cross-Claimants, v. DR. ROGER RUSSELL, Cross-Defendant.	

In this matter, the Court has heard evidence and entered written findings of fact and conclusions of law pursuant to Rule 52 of the Utah Rules of Civil Procedure. Based on these findings and conclusions, the Court enters judgment in this case and orders as follows:

1. Plaintiffs Jim and Jan Purkey (hereinafter "the Purkeys") have a valid right of way across Defendants Kent and Jilene Roberts' (hereinafter "the Roberts") property as indicated on the 2002 Purkey Subdivision Plat Map. The Roberts are enjoined from dumping garbage on the right of way or otherwise using the right of way in such a way that would unreasonably interfere with the Purkeys' use thereof.

2. The legal boundary between the Purkeys' property and the Roberts' property is the boundary indicated on the 2002 Purkey Subdivision Plat Map. Any fences or other structures placed by the Purkeys that encroach upon the Roberts' property shall be moved at the Purkeys' expense. In determining whether a structure encroaches upon the Roberts' property, the Purkeys and the Roberts shall use the existing stakes and markers placed in the ground by Ludlow Engineering. If the markers no longer exist, the Purkeys and the Roberts shall share equally the cost of hiring Ludlow Engineering (or such other qualified surveyor as the parties may agree) to re-establish boundary markers.

3. The Purkeys shall construct a new road that follows the easement on the 2002 Purkey Subdivision Plat Map, following the location, grade and other specifications listed in the Feasibility Study prepared by Ludlow Engineering.

4. The Purkeys shall complete construction of the road and the removal of all structures placed on the Roberts' property by September 23, 2010.

5. The Purkeys' other requests for damages and injunctive relief against the Roberts based on nuisance and interference with the easement are denied.

6. The Roberts' requests for damages against the Purkeys based on trespass, conversion, and negligence are denied.

7. From the east end of the Roberts' north boundary to the west side of the Roberts' house, the legal boundary between the Roberts' property and Cross-Defendant Roger Russell's (hereinafter "Russell) property is the boundary indicated by the 2002 Purkey Subdivision Plat Map.

8. The Roberts' request for damages against Russell based on trespass is denied.

9. Each party is to bear their own costs and attorney fees.

SO ORDERED this 15th day of Sept., 2010.

BY THE COURT:

/S/ /S/ MARVIN D BAGLEY

Marvin D. Bagley
SIXTH DISTRICT COURT

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing to be placed in the United States Mail, first class, postage prepaid, to the following:

Charles W. Hanna
727 North 1550 East, Ste. 400
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230 N. 350 E.
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DATED this 31st day of August, 2010.

/S/ Nathan Whittaker

A-15

SIXTH DISTRICT COURT
CLERK L Brown
2011 MAR 31 PM 3:11

JERRY D. REYNOLDS (8748)
JERRY D. REYNOLDS LAW OFFICE
PO Box 970215
Orem, UT 84097
Telephone: 801-592-7213
E-mail: JRIdaho@hotmail.com
Attorney for Counter-Defendant

IN THE SIXTH JUDICIAL DISTRICT COURT, IN AND FOR SANPETE COUNTY

STATE OF UTAH, MANTI DEPARTMENT

JIM PURKEY and JAN PURKEY. Plaintiffs, vs. KENT MAX ROBERTS and JILENE ROBERTS, Defendants,	MINUTE ENTRY AND ORDER FOLLOWING HEARING RE. DEFENDANTS' MOTION TO ALTER OR AMEND JUDGMENT AS TO CROSS-DEFENDANT DR. ROGER RUSSELL
KENT MAX ROBERTS and JILENE ROBERTS, Cross-Claimants, vs. DR. ROGER RUSSELL, Cross-Defendant.	Case No. 070600015 Judge: Marvin D. Bagley

BE IT REMEMBERED That the above entitled case came on regularly for hearing before the Honorable Marvin D. Bagley, District Judge for the Sixth Judicial District Court for Sanpete County, on Wednesday, January 19, 2011, with all legal counsel of record present.

This hearing was scheduled to allow Defendants and Cross-Claimants Kent Max Roberts, Deceased, and Jilene Roberts to have heard their Motion to Amend or Alter the Court's Judgment which followed trial of the case.

Following completion of the hearing, Judge Bagley assigned Jerry D Reynolds, trial counsel for Cross-Defendant Dr. Roger Russell, to draft the Order for the Court for those issues raised by Defendant/Cross Claimants "the Roberts" affecting Cross Defendant Dr. Russell.

The Court has reviewed all the new pleadings filed by the parties' in the form of Motions, Objections, Affidavits, and Memorandums in Support and in Opposition to the post-judgment motion brought against Dr. Roger Russell, and being fully informed, hereby Finds, Concludes, and Orders as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Court finds that at all times relevant to the issues raised at trial by the parties, no one knew with certainly where the exact location was of the North property line separating the Roberts lot and the South property line of Dr. Russell.

2. Until the final survey conducted at the instance of the Roberts, trial testimony shows that all parties thought the north fence line separating the Roberts property and the Russell property was in fact in the correct location.

3. Regarding the location of the North fence line issue, the Court has carefully reviewed the testimony of the late Kent Roberts given at trial, and the attorneys arguments regarding such, and the Court continues to conclude that Mr. Roberts did not care about the fact that the fence was apparently located too far south between the parties true properly line for that portion of the fence line located WEST of Mr.and Mrs. Roberts house, and that he essentially said so in his trial testimony. The Court finds he waived his claim about the North boundary line lying West of his home.

This conclusion is consistent with all other evidence at trial showing that for the property line lying west of the Roberts house, the land on each side of the true boundary between the two

properties is essentially featureless, with the exception of the existence of a dedicated road right of way and the existing graveled roadway built on the North right of way easement which is located on the northern portion of his property. Because of the existing graveled road, any movement of the dividing fence line seems pointless.

4. The Court finds that the existing graveled roadway cannot be moved because it has been dedicated to use by members of the Purkey Subdivision and others. Further, the Court concludes there would be no purpose in Ordering that this existing graveled road be moved.

5. The Court finds that Mrs. Roberts waived her own right to object to the testimony of her husband waiving that issue by remaining silent during her testimony at trial. The Court concludes that if she took genuine exception to his testimony, she had a duty to say so at trial.

6. The Court further finds that Dr. Russell and his attorney relied on this waiver by the Roberts' at trial, as did this Court, and other evidence which Dr. Russell had and presented regarding whether there was prior acceptance by Mr. and Mrs. Roberts when the subdivision plat was formed earlier, whether Mr. and Mrs. Roberts are bound by the field location of the plat lines made at time of the platting of the official subdivision with Sanpete County, and other like evidence and testimony was not considered by this Court.

7. The Court finds that prior pleadings of the parties were effectively amended by trial evidence as provided by URCP Rule 15.

8. The Roberts request that previous Court findings be amended to show that Dr Russell trespassed on the Roberts property is denied. The Court is convinced that such claim by Mr. and Mrs. Roberts requires a factual showing that the trespass of Dr. Russell must be shown to be wrongful. The Court finds no evidence of that. In fact, the claim involves that portion of the Roberts property that is already subject to a general easement by the public, and Dr. Russell likely had the right to be on that property as well as anyone else.

Further, the Court finds that even if the Roberts claim were true, which the Court declines to find, that damage, if any, would be very slight.

9. The Court finds that if Mr. Roberts objected to Dr. Russell's contractor placing the fence west of his house at the location where it was placed, Mr Roberts should have objected then. Trial evidence shows that Mr. Roberts was well aware of the new fence when it was built, watched its construction, and even had conversation with the builder at the time the contractor constructed it.

10. The Roberts' have asked the Court to enter some type of injunction. The Court declines to do so because the Court finds no evidence that Dr. Russell was guilty of any wrongful conduct, therefore there is no proof of anything to enjoin.

11. The Court concludes that Dr. Russell prevailed in his defense of the Cross Claim by successfully refuting the claims made against him. The Court finds that Dr. Russell

does not have to show any affirmative defense, none was needed in order for him to prevail.

12. The Court asked counsel for Mr. and Mrs. Roberts whether it was true that the primary goal of this new Motion was to obtain attorneys fees against Dr. Russell for the Roberts. To his credit, Counsel admitted this was so. The Court further finds that even if the Court were to award fees against Dr. Russell, that such fees would be small because the bulk of the litigation was all directed against the claim of the Purkeys, and presenting Roberts' evidence against the Purkeys.

ORDER

The Court having considered all of the evidence presented and the arguments of counsel provided, the Motion to Amend or Alter filed by Mr. and Mrs. Roberts is Denied.

DATED this 30th day of ~~February~~ March, 2011.

HONORABLE MARVIN D. BAGLEY
Sixth District Judge

Approved as to form:

(Date)

Charles Hanna
Attorney for Plaintiffs Purkey

3/2/2011
(Date)

Nathan Whitaker
Attorney for Defendants Roberts

CERTIFICATE OF SERVICE

I hereby certify that on this 31 day of ~~February~~ March, 2011, a true and correct copy of the foregoing document was served by the method indicated below, to the following:

CHARLES HANNA
727 North 1550 East, Suite 409
Orem, Utah 84097

Nathan Whittaker
DAY SHELL &LIJJENQUIST L.C.
45 East Vine Street
Murray, UT 84107

Jerry D. Reynolds
230 North 350 East
Orem, UT 84057

Samuel H Brown
Clerk of the Court